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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-257

DR. REGINALD A. HAWKINS,
DR. JOHN P. STINSON and
DR. GEORGE T. NASH,

Petitioners,

v.

THE NORTH CAROLINA BOARD
OF DENTAL EXAMINERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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THE NORTH CAROLINA BOARD
OF DENTAL EXAMINERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, filed in this proceeding on April 30, 1973, which affirmed the judgment and opinion of the North Carolina Court of Appeals of February 21, 1973.

OPINIONS BELOW

The judgment of the Supreme Court of North Carolina and the judgment and opinion of the North Carolina Court of Appeals are reported at 17 N.C.App.378, 194 S.E.2d 540 (1973). The judgments and opinions of the Superior Court of Mecklenburg County, North Carolina, and of the North Carolina Board of Dental Examiners are unreported. All opinions, judgments and orders are reprinted in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), the petitioners having asserted below and are asserting here the deprivation of rights secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The judgment and opinion of the North Carolina Court of Appeals was entered on February 21, 1973, affirming the judgment and orders suspending the licenses of the petitioners to practice dentistry. Thereafter, on April 30, 1973, the Supreme Court of North Carolina denied certiorari and dismissed the petitioners' appeal. Mr. Chief Justice Burger extended the time for filing this petition for certiorari to and including August 7, 1973.

QUESTION PRESENTED

Whether petitioners were deprived of due process and equal protection of the law in being singled out for disciplinary proceedings by the North Carolina State Dental Examiners because of their race and their efforts to use the federal courts to challenge the racially discriminatory practices of the Dental Examiners and other State agencies involved in these proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following North Carolina General Statutes:

> § 90-22. Practice of dentistry regulated in public interest; article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.—(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. The article shall be liberally construed to carry out these objects and purposes.
>
> (b) The North Carolina State Board of Dental Examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina and who possess other qualifications hereinafter specified and who shall have been elected in an election held as is hereinafter provided in which

every person licensed to practice dentistry in North Carolina and residing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two members for such terms of three years each. Any vacancy occurring on said Board shall be filled for the period of the unexpired term by a majority vote of the remaining members of the Board. No person shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry in North Carolina and unless he has had such license to practice dentistry in North Carolina for not less than nine consecutive years prior thereto.

§ 90-24. Quorum; adjourned meetings. – Four (4) members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day.

§ 90-41. Revocation or suspension of license.– Whenever it shall appear to the North Carolina State Board of Dental Examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said Board of Dental Examiners a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license, or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him

unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of willful neglect in the practice of dentistry, or has had a professional connection or association with any person, firm or corporation in any manner in an effort to avoid and circumvent the provisions of this article, or has permitted the use of his name by another for the illegal practice of dentistry by such person, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art, skill or knowledge, or of his method of treatment or practice, or has been convicted of or entered a plea of guilty to a felony charge, or any offense involving moral turpitude, or has by himself or another, solicited or advertised in any manner for professional business, or has been guilty of any other unprofessional conduct in the practice of dentistry, or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification, the Board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said Board, will be commensurate with the offense committed: Provided, however, it shall not be considered advertising within the meaning of this article for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication, or to place upon the window or door of his office his name followed by the word, "dentist."

The North Carolina State Board of Dental Examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of the said Board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State. Such investigator so appointed by the North Carolina State Board of Dental Examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said Board, upon presentation by the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the Board or a quorum thereof, which time shall not be less than ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said Board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the Board shall determine its action and announce the same.

From any action of the Board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the Board. The record of the hearing before the North Carolina State Board of Dental Examiners shall constitute the record upon

appeal in the superior court and the same shall be heard in the superior court as in the case of consent references.

STATEMENT OF THE CASE

Petitioners seek review of the decision of the North Carolina Court of Appeals, review having been denied by the Supreme Court of North Carolina, which affirmed the opinion and order of the North Carolina Board of Dental Examiners. The orders herein involved suspended the licenses of petitioners to practice dentistry for periods ranging from 60 days to 18 months. Petitioners challenge the entire proceeding before the Board of Dental Examiners from initiation through final disposition, as racially motivated and discriminatory, biased and prejudicial, and a denial of due process of law and of a fair and impartial trial by a fair and impartial tribunal. Petitioners further challenge the suspension of their licenses as punitive and violative of their rights secured by the due process and equal protection clauses of the Fourteenth Amendment.

These proceedings were instituted by the Board of Dental Examiners on July 29, 1967. The proceedings grew out of work done by the petitioners during the summer of 1966 in a federally funded dental program for preschool children which was administered by the Charlotte-Mecklenburg Board of Education. Prior to the initiation of the proceedings the petitioners had been actively involved in litigation challenging the racially discriminatory practices of the Board of Dental Examiners, the North Carolina Dental Society and the Charlotte-Mecklenburg Board of Education. Petitioners had challenged as racially discriminatory the failure rate of black dental applicants by the Board of Dental Examiners. Petitioner Hawkins had successfully challenged the constitutional provisions of the North Carolina

Dental Society, which elected the Dental Board,[1] that prohibited membership in the Society to black dentists.[2] He had also successfully challenged racially discriminatory practices of the Charlotte-Mecklenburg and the North Carolina State Boards of Education.[3]

Black and white dentists had divided along racial lines, during the spring and summer of 1966, on the method and procedure for treating low-income patients in federally funded programs. Black dentists asked that such patients be allowed freedom of choice for treatment in private dental offices. Representatives of the local Dental Society, all-white, had insisted that such patients be

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[1] This practice was changed in 1961, following the filing of *Hawkins v. North Carolina Dental Society* (See note and text at Note 2) to provide for election of Board members by all licensed dentists in the State. N.C. Gen.Stat. § 90-22. The Fourth Circuit noted in *Hawkins*, however, that "[w]hile the [statutory] amendment . . . eliminated the role of the Society as such in the process of election of examiners and made it theoretically possible for a licensed, non-member dentist to become a member of the Board of Examiners, there has been no substantial change in practical results." 355 F.2d 718 at 721.

[2] *Hawkins v. North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966).

[3] See *Hawkins v. North Carolina State Board of Education*, 11 Race Rel.L.Rep. 745 (W.D.N.C., March 31, 1966) (three judge court holding unconstitutional State statutory provisions providing for educational expense grants, the closing of schools and exemption from compulsory school attendance laws in situations where desegregation of schools was ordered); *Polk and Hawkins v. Charlotte Park and Recreation Commission and Charlotte-Mecklenburg Board of Education* __F.Supp.__(W.D.N.C. Civ. No 2051, March 1, 1966) (unreported consent order prohibiting further racial discrimination in selection of participants in annual Shrine North Carolina-South Carolina high school football games); *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F.Supp. 667 (W.D.N.C. 1965), 369 F.2d 29 (4th Cir. 1966), 311 F. Supp. 265 (W.D.N.C. 1969), 431 F.2d 138 (4th Cir. 1970), 402 U.S. 1 (1971).

treated in public clinics. This controversy led to the summer program here involved being conducted in both public clinics and private offices.

Thirty-six local dentists participated in the summer program, including all of the local black dentists. Approximately 601 patients, practically all black, were treated principally by the seven black dentists.

Immediately after bills and reports were submitted, the Board of Education, the administrative agency of the program, challenged the bills of the three petitioners. The Board of Education appointed the President of the Dental Society, which had just been successfully sued by petitioner Hawkins[4] and which under state law had no jurisdiction in the matter, to conduct a study of the program. Six local dentists were appointed by the Dental Society President, four white and two black. The committee examined generally the work of the black dentists and purportedly found discrepancies in some of the work of the petitioners and one white dentist. Three white members of the committee, however, visited the white dentist and permitted him to correct his work. The committee then suggested that the petitioners had some discrepancies in their work. The School Board attorney wrote the Superintendent "I think we did all we could to protect Dr. Reynolds [the white dentist who was permitted to correct his work] who got into this difficulty without fault on the part of the [school] board."

Petitioners sought permission to reexamine their patients with alleged discrepancies and to correct any mistake. The School Board rejected their request. They then entered an agreement with the School Board not to

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[4] Petitioners were admitted to membership in the Dental Society pursuant to court order, during the summer of 1966. These proceedings followed shortly thereafter.

be compensated with respect to any patient the board contended had a discrepancy. Following this agreement the Board of Dental Examiners subpoenaed the records of the summer program.

The Dental Examiners appointed a three-man committee, two blacks and one white. This committee generally reviewed the suggested discrepancies of the six-man committee and conducted no further inquiry. The Dental Examiners initiated charges against petitioners following receipt of the three-man committee report.

Petitioners have challenged throughout the partiality of the Dental Examiners, the three-man and the six-man committees. The committees examined generally only the work of the black dentists and none of the work done of the public clinic. The white dentist was permitted to examine and correct his work. No similar efforts were made on the petitioners' behalf. The School Board employed representatives of the Dental Society to review petitioners' work. Several of these representatives, who also served on the six-man committee, were principal witnesses against petitioner Hawkins in his proceeding against the Dental Society and in this proceeding before the Dental Board. One of these representatives, Dr. Barry Miller, employed a relative of one of the Dental Board members.

The Dental Board rejected petitioners' motions for a hearing before a fair and impartial tribunal and, after several days of hearings, filed opinions and orders with respect to each of the petitioners on July 30, 1968. The Board found that there were some discrepancies in the work of each petitioner and conditionally suspended their licenses. They were permitted to continue practice if they would attend 100 chronological clinical hours of further study. (00a)

Petitioners appealed to the Superior Court of Mecklenburg County which affirmed the findings of the Board but remanded the proceedings for entry of a proper judgment. The Court held that the Board did not have authority to conditionally suspend licenses or to direct further study by petitioners.[5] (00a)

On remand, new members had been added to the Board, one of whom had expressed an opinion about the proceedings before assuming office.[6]

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[5] The statute was amended in 1971 to permit conditional suspensions. N.C. Gen. Stat. § 90-41(a) (4) "The North Carolina State Board of Dental Examiners shall have the power and authority to . . . invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper."

[6] Board Chairman Robert H. Watson wrote the following letter to the *Charlotte Observer*, the most widely circulated paper in the area, on September 5, 1968:

"The case of the State Board of Dental Examiners against Drs. Hawkins, Nash and Stinson has been very well brought to the attention of the public through the press, radio and television. There have been many news stories, editorials and letters, but there seems to be one very important consideration which has not been stated clearly: The State Board of Dental Examiners is a group of practicing dentists charged with an important and very difficult task. They are concerned with promoting and maintaining high standards of dental practice for the betterment of the dental health of the citizens of this state. They are men of character, high morals and unquestionable honor. They are willing to make many personal sacrifices and accept the great responsibility of sitting in judgment over their own kind.

The dentists who have been disciplined by the board have appealed to the courts, and now the State Board of Dental Examiners, in a sense, stands accused of discriminatory practice, poor judgment, ignorance of the law and gross unfairness.

I suspect that the members of the dental profession and the citizens of this state know better. The appeal also attacks the "system" and the vague and indefinite state statutes concerning dental practice. Constitutionality also becomes an issue.

Without further hearings, the Board entered orders suspending the licenses of the petitioners for periods ranging from 60 days to 18 months (00a)

Petitioners again appealed. The Superior Court on September 2, 1971, remanded the proceedings for the Board to hear petitions on the disposition or order. (00a) On the second remand, the Board, again including the new member who had expressed an opinion in the matter, reaffirmed the orders of suspension. (00a)

Petitioners appealed this order to the Superior Court which conducted further hearings on petitioners' motion

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All of us in dentistry realize quite well that these are "shades of gray" questions, and this is where the integrity, morals and honor of the members of the Board of Examiners give confidence and comfort to all of us in the profession.

Dentists and physicians all over the country are aware of the fact that there are many problems that must be ironed out of the existing "examiner" system, and I am proud of the fact that our North Carolina State Board of Dental Examiners is held in high esteem nationally. Members of our Board are active in the leadership of a national group studying these problems.

In some quarters the charge of discrimination may be well based. Certainly, as for the past, none of us will deny that Negroes have been deprived of an active part in dental and medical groups simply because of their race, but not where the Board of Examiners is concerned.

Many, I suspect most, of us are ashamed of the position we have taken over the years. Perhaps an even greater shame is that we are not doing more today to resolve the problems, but if there is any group of men in dentistry in North Carolina above rendering judgment based on bias, or whose actions result from vengeance, or whose decisions are based simply on the facts as they appear, it is the members of the State Board of Dental Examiners.

If this appeal could be heard without the charge of discrimination and vengeance, the court would probably find it easier to rule. In either case, the outcome will be watched with great interest by all of us. Robert H. Watson, D.D.S. Charlotte."

that they had been deprived of a fair and impartial hearing by a fair and impartial tribunal and that the orders of suspension were punitive because petitioners had sought review of the Board's initial order. The Superior Court rejected petitioners' contentions and affirmed the Board's order. (00a)

Petitioners appealed to the North Carolina Court of Appeals which affirmed the Board's order in a decision on February 21, 1973. (00a) The Supreme Court of North Carolina denied certiorari on April 30, 1973.

REASONS FOR GRANTING THE WRIT

THE SELECTIVE AND PUNITIVE PROSECUTIONS INVOLVED HERE REQUIRE REVIEW BY THIS COURT TO PROTECT PETITIONERS' RIGHT TO A FAIR AND IMPARTIAL HEARING AND TRIBUNAL. REVIEW IS FURTHER WARRANTED TO PROTECT PETITIONERS FROM SELECTIVE AND PUNITIVE PROSECUTIONS BECAUSE OF THEIR USE OF THE FEDERAL COURTS TO ASSERT THEIR RIGHTS TO EQUAL PROTECTION OF THE LAW.

A fair trial in a fair tribunal is a basic requirement of due process.[7] This fundamental right pertains whether the proceeding is judicial or administrative or quasi-judicial in nature.[8] Indeed, fairness in administrative proceedings and before administrative tribunals is even

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[7] *Tumey v. Ohio*, 273 U.S. 510 (1927); *Re Oliver*, 333 U.S. 257 (1947); *Re Murchison*, 349 U.S. 133 (1954); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Ham v. South Carolina*, 409 U.S. 524 (1973).

[8] *Ohio Bell Telephone Co. v. Public Utility Comm'n*, 301 U.S. 292, 304 (1937); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

more essential where due process strictures may be more relaxed in the interest of expedition and administrative efficiency.

This Court has been equally concerned with punitive measures by State agencies to inhibit or to prevent persons from using the courts to enforce federally protected rights.[9]

These proceedings present a classic example of both deprivation of a fair and impartial hearing and tribunal and punitive prosecutions because of petitioners' efforts to obtain compliance by respondents and other state agencies involved here with the equal protection clause of the Fourteenth Amendment. The proceedings were tainted with unfairness and punitive motives throughout. They involve not one or two isolated instances of discrimination but rather long-continued and pervasive practices which taken together show a determined effort on the part of respondent, its alter ego, the North Carolina Dental Society and the Charlotte-Mecklenburg Board of Education to punish petitioners and other blacks because of their civil rights efforts.

Just immediately prior to the initiation of these proceedings, black dentists in North Carolina were not allowed to participate in the governance of dentistry in the State. They were denied membership in the North Carolina Dental Society by express provision of its constitution. The Dental Society selected the members of the Dental Board which licensed and supervised dental practitioners. The Charlotte-Mecklenburg Board of Education had continued to operate racially segregated schools despite the years which had passed since *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

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[9] *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958); *United States v. Jackson*, 390 U.S. 570 (1968); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Petitioners, particularly Hawkins, had brought numerous proceedings in federal court challenging these continued racially discriminatory practices.[10] Petitioners had just recently been admitted to the Dental Society and had obtained an order enjoining further discrimination by the Board of Education when these proceedings were initiated. And although the method for selecting the Dental Board had been changed to permit each licensed dentist in the State to vote on its members, Chief Judge Haynesworth of the Fourth Circuit had noted that the control of the Dental Board and dentistry remained with the Dental Society and principally white dentists. *Hawkins v. North Carolina Dental Society*, 355 F.2d 718, 721 (4th Cir. 1966).

It was under these circumstances that the proceedings were begun. The School Board, shortly after the Fourth Circuit affirmed the District Court's injunctive order against it, appointed the President of the Dental Society to review petitioners' works. The Dental Society President appointed a 6-man committee, consisting of 4 whites and 2 blacks. The whites on the committee included 2 adversaries against petitioner Hawkins in his proceeding against the Dental Society. The committee, although purportedly sampling the entire summer program focused their review principally on the work of the black dentists. One white dentist was inadvertently listed as having discrepancies. Three white members of the committee went to his office and assisted him in correcting his mistakes. He was dropped from further proceedings. The committee then focused its charges of discrepancies on the work of the petitioners.

The Dental Board subpoenaed the records of the summer program and appointed a 3-man committee, consisting of a black professor from Howard, one from

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[10]See note 3, *supra*.

Meharry and a white professor from the University of North Carolina Dental School. This committee generally reviewed the work of the 6-man committee. It conducted no further review or study. It made no inquiry into the elimination of the white dentist or the letter of the School Board attorney that all steps had been taken to protect the white dentists. The 3-man committee simply adopted most of the findings of the 6-man committee. Thus the selective prosecutions were set. All white dentists had been protected. Petitioners were to face charges of discrepancies in their work before a board just recently enjoined in a suit by petitioners from continuing its racially discriminatory practices.

Petitioners immediately moved for a hearing before a fair and impartial tribunal. They made this request at appropriate stages throughout the proceedings. All such motions were rejected, although the principal witnesses against petitioners included the same adversaries of petitioners in the Dental Society proceeding and an employer of a relative of one of the Board members. This afforded the same kind of opportunity to prejudice the fact finders as considered by this Court in *Turner v. Louisiana*, 379 U.S. 466 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966); *Gonzales v. Beto*, __U.S.__, 31 L.ed.2d 787 (1972). Additionally, one Board member who was later added, publicly expressed an adverse position with respect to petitioners' contentions before assuming office.[11] With the deck thus stacked, it was literally impossible for the petitioners to receive a fair and impartial hearing by an impartial tribunal. And even were there some evidence to support charges of some discrepancies in petitioners' work, the unconstitutional means employed in initiating these procedures and in the

[11] See note 6, *supra*.

hearing afforded should vitiate any support for the findings and orders. Cf. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Monroeville*, 409 U.S. 57 (1972); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943). Moreover, neither the Dental Board, the Dental Society nor the School Board took any steps at any time to correct the alleged discrepancies giving rise to these charges. Petitioners were denied any opportunity to correct their alleged mistakes. This further shows that the prosecutions were punitive rather than efforts of the Dental Board to protect the health and welfare of the public.

The Board initially conditionally suspended petitioners' licenses and directed that they attend 100 chronological hours of clinical training. The Superior Court held that the Board had no jurisdiction to conditionally suspend licenses. On remand, the Board simply suspended petitioners licenses for periods ranging from 60 days to 18 months. It made no additional findings that suspensions were warranted. Nor could it. The suspensions were but part of the continued effort of the Board to punish petitioners for their earlier civil rights efforts and further because petitioners had sought review of the Board's initial decision. Such punitive measures have also been condemned by this Court. *North Carolina v. Pearce. supra*; cf. *United States v. Jackson, supra.*

The North Carolina Court of Appeals failed to weigh the prejudicial conduct and effect of the respondents' practices and that of the Dental Society and the Charlotte-Mecklenburg Board of Education. The court seemed content that there was some evidence to support the charges and discrepancies in petitioners' work. The court simply concluded that the discrepancies of the white dentist was found by the Review Committee to be without merit. It failed to consider, or ignored, that 3 white members of the committee had visited the office of

the white dentist and allowed him to correct his work; that the school board attorney had written of his efforts to protect the white dentist involved in the program; that one of the members of the Board had expressed an opinion in the case before assuming office; that a relative of a Board member was employed by one of its principal witnesses; that the Dental Society President who appointed the 6-man committee was without any authority in the matter; that the review of the work of the dentist centered principally on the work of the black dentists; that the petitioners had only recently, and then only pursuant to court order, been allowed to become members of the Dental Society; that all the parties involved in these proceedings had been adversaries in other proceedings which had produced real and not imagined prejudice and bias on the part of the Dental Board and others associated with it. The Court of Appeals seemed content that the state's statute provided for a hearing before the Dental Board, apparently relying on the rule of necessity. See *Brinkley v. Hassig*, 83 F.2d 351, 356-357 (10th Cir. 1936). The rule of necessity—that statutorily designated hearing officers, although prejudiced and biased, will not be required to disqualify themselves where no other hearing officer is provided for by statute, applies, however, only where the hearing officer has exclusive jurisdiction and the administration of justice would otherwise be completely barred. The necessity exception does not apply where some other procedure is available to afford a fair hearing before a fair and impartial tribunal. See *State of Alabama ex rel. Miller v. Aldridge*, 212 Ala. 660, 103 So. 835 (1925); *Smith v. Department of Registration and Education*, 412 Ill. 332, 196 N.E. 2d 772 (1952). Here the North Carolina General Statutes expressly provided an alternative procedure by either a proceeding by the Attorney General of

the State of North Carolina, the solicitor of any Superior Court of North Carolina or any resident citizen of the State.[12]

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[12]*N.C. Gen. Stat.* §90-41.1 *Enjoining unlawful acts.* – The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, *or the doing, committing or continuing of any of the acts prohibited by this article by any person or persons, whether licensed dentists or not*, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the solicitor of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of the parties. (Emphasis added)

Moreover, even were there any question about N.C. Gen. Stat. §90-40.1 providing an alternative procedure, the evidence of the bias and racially discriminatory practices and motivations of the Board here, we submit, require that the decision of the Dental Board be set aside and the State required to provide some alternative procedure. *Cf. Tumey v. Ohio, supra; Re Murchison, supra.*

These proceedings present a matter of overriding public importance. They require review by this Court to insure the constitutionally protected rights of the petitioners to a fair and impartial hearing by a fair and impartial tribunal. They further require review to insure that petitioners are not punished because of their use of the federal courts to insure compliance by respondents and other state agencies with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. If the orders of the Dental Board stand they would have the same substantial chilling affect on petitioners and other blacks throughout the country who seek to enforce their rights of equal protection as the state statutes involved in *NAACP v. Button, supra.* Petitioners civil rights efforts here as in *NAACP v. Button* must be provided "breathing space to survive." 371 U.S. at 433.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the decision of the North Carolina Court of

Appeals and the judgment of the Supreme Court of North Carolina denying review.

Respectfully submitted,

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